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No. 90-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHICAGO HOUSING AUTHORITY, RENAULT ROBINSON, JAMES THOMAS, GEORGE CRAMER, WILBERT ALLEN, BRENDA GAINES, and JOSEPH GARDNER,

Petitioners,

VS.

TRIAD ASSOCIATES, INC., d/b/a GUARDIAN SECURITY, JK GUARDIAN SECURITY, INC., and K & J MANAGEMENT, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit's remand of the issue of corporate racial identity conflicts with the decisions of any other circuit or this Court?

2. Whether the Seventh Circuit's holding that white corporations may claim the protection of 42 U.S.C. § 1985(3) conflicts with the decisions of any other circuit or this Court?

3. Whether the Seventh Circuit's remand of Triad's due process claim conflicts with the decisions of any other circuit or this Court?

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Respondents Triad Associates, Inc., JK Guardian Security, Inc. and K & J Management, Inc. (collectively "Triad") respectfully request that this Court deny the petition for a writ of certiorari.

Petitioners Chicago Housing Authority, Renault Robinson, James Thomas, George Cramer, Wilbert Allen, Brenda Gaines and Joseph Gardner (collectively "CHA") have utterly failed to justify a grant of certiorari in this case. The CHA has succeeded only in mischaracterizing both the decision below and using that mischaracterization to create an artificial tension with rulings made by this Court and the other circuits.

As demonstrated herein, no tension exists. A fair reading of the Seventh Circuit's opinion indicates that, although the Seventh Circuit strongly suggests the proper resolution of this case, there has not been a definitive substantive ruling on the issues of corporate racial identity or due process. In addition, the decision is in no respect inconsistent with the rulings of this Court or other circuits. There are no issues appropriate for this Court's review.

The case, which to date has not progressed beyond petitioners' challenge of the pleadings, should be permitted to return to the district court for further proceedings and full development of the factual record. Only then will it become clear whether a review by this Court is either necessary or appropriate.

I.

THE SEVENTH CIRCUIT'S REMAND OF THE ISSUE OF CORPORATE RACIAL IDENTITY DOES NOT REQUIRE REVIEW BY THIS COURT

The CHA argues, first, that "[t]he Seventh Circuit decided the issue of corporate racial identity in a manner that conflicts with this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977)" and, second, that "[t]his Court's ruling in *Croson v. City of Richmond*, ___ U.S. ___, 109 S.Ct. 706 (1989), is inapposite to the issue of corporate racial identity raised here." (Pet. at 6-7, 10)[1] As demonstrated below, both contentions lack merit.

The CHA's argument in regard to *Arlington Heights* is based on a false premise. The Seventh Circuit did not decide that corporations can have a racial identity; instead, it ruled that *Arlington Heights* does not foreclose such a holding. The Seventh Circuit's conclusion that the Supreme Court did not resolve the question is confirmed by the express language of *Arlington Heights:* "[b]ecause of the presence of [an individual plaintiff]," the Court opted "not [to] consider whether the other individual and corporate plaintiffs have stand-

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1 References to the Appendices to the Petition are cited as "App.," and references to the Petition are cited as "Pet."

ing to maintain the suit." *Arlington Heights,* 429 U.S. at 264, n. 9. The panel stated that there is an "absence of a definitive ruling from the Supreme Court on this issue," and recognized the existence of post-*Arlington Heights* cases that "have held that a corporation may have standing to allege racial discrimination." (App. A at 15) The Seventh Circuit "remand[ed] [the case to the district court for] consideration in light . . . of [this] precedent." Thus, there is no conflict between the opinion below and *Arlington Heights.* (App. A at 15)

The CHA again mischaracterizes the decisions of the appellate court and this Court in arguing that the Seventh Circuit improperly considered *Croson.* The CHA contends that *Croson* "is irrelevant to this case because no government enacted set-aside program is involved here which would provide a basis for the racial classification of corporations." (Pet. at 10) First, the Seventh Circuit did not, as the CHA argues, rely solely on *Croson* as an alternative basis for its ruling. (Pet. at 8) While clearly suggesting the proper result, the Seventh Circuit eschewed a definitive ruling and instead cited numerous post-*Arlington Heights* cases, *Croson* among them, which suggest "that a corporation *may have standing* to allege racial discrimination."[2] (App. A at 15) (emphasis added) Conspicuous by its absence from the CHA's brief is any case that conflicts with this limited disposition.

Moreover, *Croson* is entirely relevant to this case. There, the Court struck down the City of Richmond's minority set-aside law on grounds that the statute violated the equal protection clause because it "denie[d] certain citizens the opportunity to compete for a fixed percentage of public contracts *based solely upon their race.*" *Croson,* 109 S.Ct. at 721 (emphasis added). The lone plaintiff challenging the Richmond Plan as racially discriminatory was a corporation, the J.A. Croson Company. The inescapable implication of these facts is that a corporation can have a racial identity for purposes of the equal

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2 The CHA mischaracterizes both *Hudson Valley Freedom Theater, Inc. v. Heimbach,* 671 F.2d 702, 706 (2d Cir.), *cert. denied,* 459 U.S. 857 (1982) and *Marshall v. Kleppe,* 637 F.2d 1217, 1220 (9th Cir. 1980), each of which either explicitly or implicitly supports the idea that a court may ascribe a racial identity to a corporation based on the race of its owners.

protection clause and the civil rights laws; otherwise, J.A. Croson would have lacked the standing necessary to raise such a claim.[3] The Seventh Circuit therefore was correct when it ruled that *Croson* and other cases at a bare minimum compelled further scrutiny of Triad's allegations.

The CHA argues that if "the Court has left the issue of the racial identity of corporations undecided for resolution in another case, this case now specifically raises this issue and certiorari should be granted to eliminate any uncertainty." (Pet. 8, n. 3) The mere fact that corporate racial identity is part of this case does not make it appropriate for Supreme Court review. Absent a definitive ruling or a conflict, the corporate racial identity issue provides no basis for granting certiorari.

II.

THE SEVENTH CIRCUIT'S RULING ON THE PROTECTION OF WHITE CORPORATIONS UNDER SECTION 1985(3) DOES NOT PRESENT A QUESTION APPROPRIATE FOR REVIEW

The CHA argues that the Seventh Circuit has disregarded its own precedent, that of other circuits and this Court's line of reasoning in ruling that a white corporation may be entitled to the protection of

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3 Indeed, there is reason to believe, as the panel strongly suggested (App. A at 15), that a court can ascribe race to a corporation. It is well-established, for instance, that corporations are fully protected by the equal protection clause. *Wheeling Steel Corp. v. Glander,* 337 U.S. 562, 574 (1949) (Jackson, J.). Moreover, the CHA's suggestions to the contrary notwithstanding, neither the structure of a corporation, particularly a corporation like Triad, which was small and had only two shareholders, nor the volatility of the business world presents any obstacle to this conclusion. First, the separation of a corporation and its owners exists to insulate stockholders from liability for corporate acts and thereby encourage investment in productive enterprises, Henn and Alexander, *Corporations* §73, p. 130 (3d ed. 1983), not to prevent companies from relying on the Constitution to defend themselves against discrimination. Second, since a court ascribing race to a company need look to the race of corporate ownership *only at the time* of the discrimination, subsequent changes in ownership do not bar the assertion of a corporate racial identity.

§1985(3). Again, the CHA strains to create conflicts that simply do not exist.

First, the CHA has cited no case in which any court has ruled that either a white person or a white corporation is unprotected by §1985(3). In fact, the Seventh Circuit has explicitly extended § 1985(3) protection to persons discriminated against on the basis of sex, religion, ethnicity and political views. *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988). Other circuits have followed suit. *New York State Nat'l. Org. for Women v. Terry*, 886 F.2d 1339 (2nd Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990) (women are a protected class under § 1985(3)); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (political affiliation with racial overtones); *Ward v. Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (members of the Unification Church); *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980) (protection not foreclosed to "new" classes).

The Seventh Circuit's decision has not created a conflict among the circuits. The cases from other circuits cited by the CHA, while denying protection, merely require that §1985(3) cases be brought by members of classes with "discrete and insular" characteristics. *See, e.g., Terry*, 886 F.2d at 1359; *McLean v. International Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987); *National Communication Sys. v. Michigan Pub. Serv.*, 789 F.2d 370, 374 (6th Cir.), *cert. denied*, 479 U.S. 852 (1986); *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985). The "classes" found to be unprotected by these circuits were either not well-defined, *McLean*, 817 F.2d at 1219 (scapegoats are not a well-defined class); *Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176-77 (10th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) (handicapped is not a well-defined class); created after the tort had occurred, *Buschi*, 775 F.2d at 1258 (whistleblowers); or were groups whose attributes did not provoke the animus against the plaintiff, *Harrison v. Brooks*, 519 F.2d 1358, 1360 (1st Cir. 1975). The Seventh Circuit's holding that Triad may be protected is consistent with both its precedent and that of other circuits.

Second, unable to point to an actual conflict with a case decided by this Court, the CHA instead claims that the Seventh Circuit

"disregards . . . this Court's clear line of authority." (Pet. at 12) In neither of the two cases cited by the CHA did this Court rule that §1985(3) did not extend to white corporations. In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), in which the Court considered a civil rights action brought by blacks, the Court expressly stated that "there must be *some* racial, or perhaps otherwise class-based, invidiously discriminatory animus . . . ." *Griffin*, 403 U.S. at 102 (emphasis added). In *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983), the Court held that discrimination for economic reasons cannot be redressed under the statute. The Seventh Circuit's decision conflicts with neither case.

In fact, this Court has applied the Civil Rights Statutes as broadly as their language implies. *Griffin*, 403 U.S. at 97. Section 1981, for instance, has been applied to protect whites in addition to non-whites. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96 (1976). The plain language of §1985(3) states that *any person* or *class of persons* deprived of the equal protection of the laws may recover damages. This language does not limit §1985(3) to blacks.[4] To hold otherwise would be inconsistent with other civil rights statutes. "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color . . . ." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978). The Seventh Circuit's decision is consistent with this precedent.

The §1985(3) issue is not appropriate for review. In addition to the possibility that future developments in the district court might render the issue moot, the Seventh Circuit's treatment of white corporations under §1985(3) does not conflict with the precedent of this Court or any circuit.

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4 A full perusal of the legislative history behind § 1985(3) would lead to a broad interpretation. *Scott*, 463 U.S. at 845-53 (Blackmun, J., dissenting). Congress's intent was not solely to protect blacks, but all classes whose beliefs or associations placed them in danger of not receiving equal protection of the law from local authorities.

III.

THE SEVENTH CIRCUIT'S REMAND OF THE DUE PROCESS ISSUE DOES NOT REQUIRE REVIEW BY THIS COURT

The CHA contends that the Seventh Circuit's due process analysis is "in conflict with the decisions of other Circuits" and "open[s] every public contract breach to a due process claim." (Pet. at 16-17) Both contentions are erroneous on their face.

First, although the Seventh Circuit's opinion strongly suggests a due process violation, the Court did not decide finally whether Triad suffered any denial of due process. Rather, the panel articulated the flawed analysis of the district court, specifically the district court's failure to consider the imposition of a duty of good faith under Illinois contract law, and then remanded the issue "for full consideration consistent with this opinion." (App. A at 13)

Second, and contrary to the CHA's contention otherwise, the Seventh Circuit's finding of a possible due process violation is limited in two distinct respects. Initially, the Seventh Circuit explicitly limited its holding: ". . . our decision today is necessarily limited to situations in which the applicable state law implies a 'duty of good faith' into the contract . . ." (App. A at 12, n.6) Beyond this implied duty of good faith, moreover, the decision below is further limited by the facts of this case, where improper racial and political considerations underlie the bad faith. The CHA's improper use of racial and political criteria in breaching the contract places this case far outside the realm of typical breach of contract cases.

In arguing that the Seventh Circuit's decision reaches every public contract, the CHA fundamentally mischaracterizes Triad's due process claim as based solely on an allegation that there was "a reduction in the number of hours Triad was paid under its contract . . ." (Pet. at 16) This mischaracterization of Triad's claim, which wholly ignores the political and racial animus underlying the CHA's breach, undermines the CHA's contention that the Seventh Circuit's decision is inconsistent with the due process decisions of other circuits. None of the cases cited by the CHA involved contract

breaches motivated by racial or political animus. The only rule arising from the cases cited is that "the Due Process Clause is invoked to protect something more than an ordinary contractual right." *S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962, 966 (2nd Cir. 1988). Put slightly differently, no due process claim arises where ". . . the only basis for federal jurisdiction is that a state actor is one of the contracting parties." *Ramsey v. Board of Educ. of Whitley County, Ky.*, 844 F.2d 1268, 1273 (6th Cir. 1988). The peculiar facts of this case, as the Seventh Circuit explicitly reasoned, implicate a great deal more than an ordinary breach of a contract right; rather, the allegation here is of bad faith in the form of racial and political animus by a municipal corporation.

What the Seventh Circuit did was to find a possible due process violation arising from the unique reality of the CHA's racial and political motivation in breaching Triad's contract. There is no need for this Court to review this limited holding.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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